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No. 81-2096

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

JAMES J. CLANCY, GORDON BRICKEN, JAMES E. WARD, DAVID L. BRANDT, and DAVID F. ORTIZ,
Petitioners,

vs.

JARTECH, INC., ANATUNA, INC., CINEMA 7, INC. and MOOKS, INC., all California Corporations,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether defendants in a copyright infringement suit may counterclaim against the plaintiffs for declaratory judgment that all films produced by the plaintiffs are subject to seizure and destruction because of obscenity per se?

LIST OF PARTIES

The petitioners are James J. Clancy, a private attorney who has specialized in bringing civil actions to stop exhibition of motion pictures, and Gordon Bricken, James E. Ward, David L. Brandt and David F. Ortiz, who, at all times relevant to this lawsuit, were members of the City Council of the City of Santa Ana, Orange County, State of California.

Respondents are Jartech, Inc., registered copyright holder of the motion picture, "Behind the Green Door"; Anatuna, Inc., registered copyright holder of the motion picture, "Resurrection of Eve"; Cinema 7, Inc., copyright holder of the motion pictures, "Sodom and Gomorrah", "The Autobiography of a Flea" and "Inside Marilyn Chambers"; and Mooks, Inc., copyright holder of the motion picture, "C.B. Mamas". All these respondents are California corporations, and all are controlled by James L. Mitchell and Artie J. Mitchell of San Francisco, California.

TABLE OF CONTENTS

	Page
Question presented	i
List of parties	i
The opinion below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement of the case	2
The petition seeks a moral rather than legal decision	3
Conclusion	5

TABLE OF AUTHORITIES CITED

Cases

	Page
Miller v. California (1973) 413 U.S. 15	4
Paris Adult Theater I v. Slaton (1973) 413 U.S. 49	4

United States Constitution

Amendment I	2

Statutes

19 U.S.C. Section 1305(a)	5
28 U.S.C. Section 1254(1)	2

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THE OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 666 F.2d 403, and a copy is attached to the petition as Appendix A-1.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed on January 25, 1982. On April 12, 1982, Justice Rehnquist signed an order extending the time for filing a petition for writ of certiorari to and including May 10, 1982. Petitioners invoke this Court's jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This is the third of three petitions brought in this copyright infringement suit. The other two are No. 81-2094, dealing with the defense of obscenity, and No. 81-2095, dealing with attorney's fees. This petition concerns the counterclaim that all the films produced by the Mitchell Brothers should be found contraband, seized and destroyed.

In October, 1976, the respondents here ("The Mitchell Brothers") sued James J. Clancy and five members of the City Council of Santa Ana, California, for copyright infringement. Clancy had developed a technique for making "Time and Motion Studies," as he terms them (see the examples attached as Appendix D to the petition) by having an agent use a specially modified motion picture

camera and a tape recorder to film and record the motion pictures being exhibited at the Mitchell Brothers Santa Ana Theatre.

The defendants counterclaimed, seeking a determination that the motion pictures, including an additional one which had been produced after the lawsuit was filed, were obscene *per se*, and thus to be seized and all prints destroyed by order of the court.

Before the matter went to the jury the trial judge bifurcated the trial, reserving matter of the counterclaim to himself. In November, 1979, eleven months after the jury verdict, the trial court dismissed the counter-claim because there was no longer a controversy between the parties, and alternatively that the counter-claim failed to state a cause of action and the court was without jurisdiction to order seizure and destruction of the films.

The Ninth Circuit upheld this ruling.

THE PETITION SEEKS A MORAL RATHER THAN LEGAL DECISION

A careful reading of the petition shows that it seeks not a determination of what the law is, but rather what the petitioners believe the law should be. The summary of argument begins:

> "The recent appearance of hard-core pornographic films on television channels and in local neighborhoods in video-cassette form *should* make this Ninth Circuit copyright decision granting copyright protection to such films, a matter of great concern to this Court and a substantial federal question." [Emphasis supplied.] Petition, page 23.

Whether or not the petitioners believe there should be a substantial federal question here, they make no case that there actually is one.

The counterclaim seeks a declaration that the films produced by the Mitchell Brothers are so offensive as to be obscene as a matter of law, so that no fact issue is involved (and of course, no right to a trial by jury). For the petitioners it then follows that since the films are unarguably obscene, the district court has jurisdiction to seize them, and to order all prints destroyed.

The argument in support is actually a long series of attempts at misdirection. As an example, the trial court found that there was no controversy between the parties, and concluded that it was without jurisdiction to make a declaratory judgment on the obscenity *vel non* of the films. At pages 35 and 36 of the petition, it is urged that the *identical* [their emphasis] issue is presented in the first of these three petitions, and incorporate those arguments by reference, citing pages 44-55 of the petition in 81-2094. But those pages say nothing about lack of controversy, but rather speak of *per se* obscenity.

There is no such thing as *per se* obscenity. The determination of whether or not a work is obscene is one of fact. *Miller v. California* (1973) 413 U.S. 15; *Paris Adult Theater I v. Slaton* (1973) 413 U.S. 49.

Further, there is no statutory or case authority for the proposition that a private attorney and a group of members of a city council, acting as private citizens, may bring suit in a federal district court for the destruction of all prints of a motion picture film. Petitioners cite the law

governing imports (19 U.S.C. Section 1305(a), but make no effort to bring themselves within its ambit.

The petition is without merit.

CONCLUSION

For the foregoing reasons it is respectfully requested that the petition for writ of certiorari be denied.

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